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Supreme Court, U.S.
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No. 10-961

IN THE

Supreme Court of the United States

SANJAY KUMAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

This brief is respectfully submitted in reply to the government's opposition to Mr. Kumar's petition for certiorari.

1. Much of the government's opposition is devoted to arguing that the Sentencing Guidelines do not present *ex post facto* concerns now that they are advisory. (Govt. Opp. at 9-12, 16-18). Suffice it to say that that issue is one on which the Courts of Appeals are sharply divided. *See United States v. Wetherald*, 2011 WL 1107208 (11th Cir. 2011)(discussing "split on the impact of *Booker* in regards to the Ex Post Facto Clause"). The government is correct that Mr. Kumar's petition, as now framed, does not pose the issue. That is because the government conceded below that the *Ex Post Facto* Clause applies to advisory Guidelines. *See* 617 F.3d at 626 n.12. The government does not ask to be relieved of that concession, and so the issue here is straightforward: in light of the government's concession, did the retroactive application of the 2005 Manual to calculate Mr. Kumar's offense level for securities fraud crimes completed in 2000 violate the *Ex Post Facto* Clause, where the use of 2005 Manual dramatically increased his Guidelines range.

2. Understandably, we believe that the government should be held to its concession. Alternatively, of course, this Court could ask the parties to brief two questions: (i) do advisory Guidelines raise *ex post facto* concerns; and (ii) if so, was the Clause violated here. *See Grove City College v. Bell*, 465 U.S. 555, 562 n.10 (1984)(a "concession . . . is not binding on us and does not foreclose our review of the judgment below"). Both issues are certworthy: on

the first issue, the Courts of Appeals are clearly divided, and on the second, the decision below is clearly wrong. The government, we take it, is prepared to address both issues, since it refers to its concession as premised on its "outdated view" of the law. (Govt. Opp. at 18). In any event, it would be perverse if Mr. Kumar's petition were denied on the ground that the government conceded the first question below.

3. Contrary to the government's opposition, the one-book rule does not eviscerate basic *ex post facto* principles. Consider a simple hypothetical. Assume (i) Congress enacts a law in 1987 that says that the punishment for a crime is that in effect on the date of the last offense in the series of offenses for which the defendant is being sentenced; (ii) the defendant commits a securities fraud in 2000 -- at which time the punishment for securities fraud is five years -- and an obstruction offense in 2004 -- at which time the punishment for obstruction is five years, and the punishment for securities fraud has been increased to 20 years; and (iii) the defendant is sentenced for both crimes in 2006. Surely, no one would suggest that the defendant could be sentenced to 20 years for his securities fraud merely because Congress had enacted a law that, to borrow the government's words, "put[] the defendant on notice, that if he commits a series of offenses and is prosecuted in a single proceeding, the [punishment] in effect when he commits the last offense will be used in sentencing him for [each] of the offenses." (Govt. Opp. at 12-13). Simply stated, the *Ex Post Facto* Clause cannot be overcome by a notice provision that says that the Clause does not apply. *See Miller v. Florida*, 482 U.S. 423, 431 (1987)("[t]he constitutional prohibition against ex post

facto laws cannot be avoided merely by adding to a law notice that it might be changed").[1]

4. For much the same reason, the government is simply wrong when it argues that the application of the one-book rule to Mr. Kumar's offenses is "similar to application of the most recent version of the Guidelines to a continuing offense that is begun under one version of the Guidelines but not completed until a later version has taken effect." (Govt. Opp. at 13). As we noted in our petition, the difference between the two situations is telling. Again an example is helpful. Assume that a defendant commits an embezzlement in 2000 and a second embezzlement (which is part of the same continuing course of conduct) in 2004 and that the Guideline for embezzlement is stiffened in 2003 -- *e.g.*, there is a substantial increase in offense level based upon loss. To apply the 2003 Guideline at sentencing does not offend *ex post facto* principles. In effect, the defendant is being sentenced for his 2004 offense, which was completed *after* the change in law, and his punishment for *that* crime is being increased for his prior criminal activity (*i.e.*, for his 2000 offense, which is relevant conduct). *See, e.g.*, *United States v. Cooper*, 35 F.3d 1248, 1252 (8th Cir. 1994)("[t]o hold otherwise could lead to the

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1. As the hypothetical shows, the fact that such a general notice provision was in effect before the defendant committed any of his crimes does not trump the fundamental rule that "[a]n *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable *when it was committed*." *Fletcher v. Peck*, 6 Cranch 87, 138 (1810)(emphasis added). *Compare* Govt. Opp. at 13 n.2 (relying on fact that "[t]he one-book rule was in effect before petitioner committed any of the offenses for which he was punished").

anomalous result that a . . . defendant could be subject to a lower sentence if convicted of multiple offenses spanning a revision of the Sentencing Guidelines, than if convicted of the singular last offense after the revision"). In such a case, the one-book rule operates like a recidivist provision and is therefore constitutional. *See Gryger v. Burke*, 334 U.S. 728 (1948). In Mr. Kumar's case, the one-book rule operates to increase his punishment retroactively for a completed offense (his securities fraud crime), which is unconstitutional. *See Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967)(three-judge court), *aff'd* mem., 390 U.S. 713 (1968).

5. Finally, the government argues that "[t]he sentencing record strongly suggests that petitioner would have received the same sentence even if the district court had not used the one-book rule to calculate his advisory range." (Govt. Opp. at 15). That is untrue. Mr. Kumar was sentenced based on the assumption that his offense level was 50, which carries an advisory guideline of life imprisonment. The district court then departed downward based on Mr. Kumar's extraordinary charitable acts and the fact that the loss "substantially overstated the seriousness of the offense," and imposed a 12-year sentence. If we are correct that the 1998 Manual should have applied to Mr. Kumar's offenses, then his combined level is 30, and the advisory Guidelines range would be 97 to 121 months. To suggest that that starting point -- 97 to 121 months as compared to life -- would not have affected Mr. Kumar's sentence is to blink at reality.[2]

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2. In a footnote, the government argues that the proper range under the 1998 Guidelines was not 97 to 121 months but 188 to 235 months. This new math assumes 2 points for mass marketing,

Where a sentencing judge starts generally affects where he finishes, and the judge here started, quite literally, off the chart. *See United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008)("Sentencing Guidelines provide a[n] . . . 'anchor' for judges").

In our petition, we sought to show (i) that the decision of the Court of Appeals runs counter to the most fundamental precept of *ex post facto* law in that it authorizes imposition of enhanced punishment for a completed crime; (ii) that the Court of Appeals relied upon a form of constructive notice that this Court rejected in *Miller*; (iii) that the Court of Appeals seriously misread *Gryger* to support its position; and (iv) that its decision is at odds with *Greenfield*. The government's opposition seeks to muddy the waters, but it does not succeed in casting doubt on any of these truths. If we are right, Mr. Kumar was punished retroactively, which our Constitution forbids. *See* The Federalists No. 44 at 282 (Clinton Rossiter ed. 1961)("*ex post facto* . . . laws are contrary to the first principles of the social compact").

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of which there was none and for which the government did not seek an enhancement below; 2 points for abuse of trust, which is inapplicable and for which the government did not seek an enhancement below; and 2 points for sophisticated means, which also does not apply (the conduct was not especially complex or intricate) and was not sought below. The reality is that if the 1998 Guidelines apply, the correct starting point (97 to 121 months) is lower than where the sentencing judge finished after departing downward on two grounds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 9, 2011

Respectfully submitted,

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